



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Andrew Miller

Portland, OR 97201

DEC 22 2015

RE: MUR 6817

Dear Mr. Miller:

On May 13, 2014, the Federal Election Commission notified you of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to you at that time.

On December 17, 2015, after reviewing the allegations contained in the complaint, your response, and other available information, the Commission voted to dismiss the allegations that you violated 52 U.S.C. § 30116(a). The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

You are advised that the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A) remain in effect, and that this matter is still open with respect to other respondents. The Commission will notify you when the entire file has been closed.

If you have any questions, please contact Allison T. Steinle, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Shonkwiler".

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR: 6817

RESPONDENT: Andrew Miller

I. INTRODUCTION

This matter was generated by a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Dr. Monica Wehby for U.S. Senate and Bryan Burch in his Official Capacity as Treasurer ("Wehby Committee"), Dr. Monica Wehby, If He Votes Like That In Salem Imagine What He Will Do In Congress and Carol Russell in her Official Capacity as Treasurer ("If He Votes"), and Andrew Miller. The Complaint alleges that If He Votes made a prohibited contribution to Wehby by coordinating a billboard and radio advertisement with the Wehby campaign.

As explained below, the Commission exercises its prosecutorial discretion to dismiss the allegations that Andrew Miller made in-kind contributions as a result of the advertisements in violation of 52 U.S.C. § 30116(a). *See Heckler v. Chaney*, 470 U.S. 821 (1985).

II. FACTS

A. Background

Dr. Monica Wehby was a candidate in the 2014 Republican Senate primary in Oregon.¹ She filed her Statement of Candidacy with the Commission on October 24, 2013. The Wehby Committee is Wehby's authorized campaign committee. Representative Jason Conger was Wehby's opponent in the primary race.

¹ Wehby won the Republican primary on May 20, 2014, making her the Republican nominee for the general election. Wehby lost the general election on November 4, 2014.

1 If He Votes is an independent expenditure-only political committee registered with the
2 Commission. It filed its Statement of Organization on March 5, 2014, and has regularly filed
3 disclosure reports and independent expenditure notices with the Commission.

4 To date, If He Votes has been funded primarily by two individuals, Loren Parks and
5 Andrew Miller. Of the \$114,033 that If He Votes has received in total receipts since its
6 formation, Parks and Miller have contributed \$83,033 and \$30,950, respectively. Of the
7 \$30,950 that Miller contributed to If He Votes, \$5,950 consisted of in-kind "billboard" expenses.
8 See If He Votes 2014 April Quarterly Report (filed Apr. 14, 2014).

9 Miller also contributed \$5,200 to the Wehby Committee on November 1, 2013, and was
10 one of 25 hosts listed on an invitation for a Wehby Committee fundraiser at a private residence
11 on April 30, 2014. See Wehby Committee 2013 Year-End Report (filed Jan. 26, 2014); Compl.,
12 Ex. C.

13 **B. If He Votes' Communications**

14 Since its formation, If He Votes has sponsored at least two communications criticizing
15 Conger.² The first advertisement was a billboard, for which Miller appears to have made the
16 in-kind contribution to If He Votes in the amount of \$5,950.³ The billboard, as represented in a
17 photograph attached to the Complaint, read:

² If He Votes' disclosure reports indicate that it also made an independent expenditure of \$6,860 for a "mailer" opposing Conger on May 15, 2014. See If He Votes July 2014 Quarterly Report (filed July 15, 2014). This mailer is not raised in the Complaint, and we do not address it in this Report.

³ If He Votes reported the receipt and corresponding disbursement of a \$5,950 "In-Kind: Billboard" contribution from Miller on March 19, 2014, on its April 2014 Quarterly Report. If He Votes did not report any additional receipts or expenditures that appear related to billboard time or production.

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1 *Republican* (?) Jason Conger voted 5 times with *Democrats* for Oregon's
2 OBAMACARE! *Imagine* how he'll vote as a U.S. Senator.

3
4 Paid for by If He Votes Like That In Salem Imagine What He Will Do In
5 Congress (www.ifhevoteslikethatinsalem.com) and not authorized by any
6 candidate or candidate's committee.

7 Compl., Ex. A (emphases in original).

8 The second advertisement was a radio advertisement. The radio advertisement, as
9 represented in an audio clip and transcript attached to the Complaint, ran 57 seconds, and stated:

10 Republican Jason Conger voted with Democrats for Oregon's Obamacare. Not
11 once or twice, or three or four times – Republican Jason Conger voted five times
12 with Democrats for Oregon's Obamacare. Republican Jason Conger also voted
13 with Democrats for the boondoggle I-5 light rail bridge. You know, the one that
14 promised astronomical costs coupled with high tolls for working people, but no
15 traffic relief. And Republican Jason Conger voted with Democrats to put the
16 government into the hotel business, competing with private enterprise. Jason,
17 Republicans don't like it when you vote that way. So now we're gonna vote 'no'
18 on Jason Conger!

19
20 Paid for by If He Votes Like That In Salem Imagine How He Will Vote In
21 Congress. Not authorized by any candidate or candidate's committee.

22 *Id.* at 2 n.2 (citing Jeff Mapes, *Timber Baron Andrew Miller Says He Didn't Tell Monica Wehby*
23 *About His Ads Attacking Jason Conger*, THE OREGONIAN, Apr. 16, 2014,
24 http://www.oregonlive.com/mapes/index.ssf/2014/04/timber_baron_andrew_miller_say.html

25 (“Mapes, *Timber Baron*”) (providing an audio clip of the radio advertisement)), Ex. B.

26 Throughout the course of the primary campaign, several news articles discussing the
27 activities of If He Votes mentioned that Miller had formerly been “romantically linked to”
28 Wehby and involved in her campaign fundraising. *Id.* at 2-4.⁴ Miller publicly denied

⁴ The Complaint specifically cites to Christian Gaston, *Top Oregon GOP Donor Andrew Miller Has Ties to*
Candidates for Governor, Senate and Congress, THE OREGONIAN, Oct. 30, 2013,
http://www.oregonlive.com/politics/index.ssf/2013/10/top_oregon_gop_donor_andrew_miller.html, and Jeff Mapes,
Andrew Miller, Friend of Monica Wehby, Helps Fund Ads Attacking Her GOP Rival, Jason Conger, THE
OREGONIAN, Apr. 15, 2014, <http://www.oregonlive.com/mapes/index.ssf/2014/04/>

1 coordinating with the Wehby campaign and was quoted as stating that “the advertising campaign
2 [by If He Votes] was run independently of Wehby and her campaign as required by federal
3 election law.” *Id.* at 2 n.2 (citing Mapes, *Timber Baron*). According to a news article in *The*
4 *Oregonian*:

5 Miller acknowledged that there is a “sidebar risk” that his advertising effort could
6 be seen negatively because of his relationship to Wehby. But, he added, “I don’t
7 think it’s relevant outside of a group of people who pay a lot of attention to
8 politics.” [Miller] said polling showed this risk was far outweighed by the
9 effectiveness of the attacks he and Parks are making on Conger’s voting record in
10 the state House.

11 *Id.*

12 Miller states that Gregg Clapper, a political consultant, ran the “PAC campaign.” Miller
13 Resp. at 1. Miller asserts that he “had no involvement in the creation of content, media
14 purchases, or timing of content dissemination to the public attributable to [If He Votes].” *Id.*
15 The Commission possesses information that corroborates Miller’s contentions.

16 III. LEGAL ANALYSIS

17 The Complaint alleges that If He Votes made a prohibited contribution to Wehby by
18 coordinating the billboard and radio advertisement with the Wehby campaign. Compl. at 3-4;
19 Supp. Compl. at 3-4. Under the Act, when a person or committee pays for a communication that
20 is coordinated with a candidate or his or her authorized committee, the communication is
21 considered an in-kind contribution from the person or committee to that candidate and is subject
22 to the limits, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30116(a)(7)(B)(i);
23 11 C.F.R. § 109.21(b). Under 11 C.F.R. § 109.21, a communication is coordinated if it: (1) is

andrew_miller_friend_of_monica.html. According to a news report that was submitted to the Commission in this matter, Miller and Wehby ended their dating relationship in the spring of 2013. See John Bresnahan, *Ore. Senate Hopeful Accused of Stalking Boyfriend*, POLITICO, May 16, 2014, <http://www.politico.com/story/2014/05/ore-senate-hopeful-accused-of-stalking-boyfriend-106751.html>).

1 paid for by a person other than the candidate or candidate's committee; (2) satisfies one or more
2 of four content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one or more of six
3 conduct standards set forth at 11 C.F.R. § 109.21(d).

4 In this matter, the payment and content prongs are satisfied. If He Votes reported making
5 a \$5,950 disbursement for billboard expenses on March 19, 2014, and \$59,557 in total
6 independent expenditures for "radio ads" between April 1, 2014, and April 3, 2014. *See*
7 11 C.F.R. § 109.21(a)(1). Moreover, based on information before the Commission, it appears
8 that the billboard and radio advertisement meet the content prong because each is a public
9 communication that clearly identified Conger, was disseminated within 90 days of the May 20,
10 2014 primary election, and was targeted to voters in Oregon. *See* 11 C.F.R. § 109.21(c)(4).

11 The main issue, therefore, is whether the communications satisfied the conduct prong.
12 The conduct standard is satisfied when, among other things, the communication is made at the
13 request or suggestion of a candidate, a candidate or authorized committee is materially involved
14 in decisions regarding the communication, or a communication is made after substantial
15 discussion about that communication with a candidate.⁵ *See* 11 C.F.R. §§ 109.21(d)(1)-(3).
16 Neither the material involvement nor substantial discussion standard is "satisfied if the
17 information material to the creation, production, or distribution of the communication was
18 obtained from a publicly available source." 11 C.F.R. §§ 109.21(d)(2), (3).

19 The Complaint asserts that Miller was "intimately involved" with Wehby both personally
20 and as a fundraiser, and therefore likely "exposed to nonpublic information about the campaign's

⁵ The other three types of conduct that may satisfy the conduct standard are using a common vendor, using a former employee, and republication of campaign materials. *See* 11 C.F.R. § 109.21(d)(4)-(6). Because the Complaint does not allege this conduct, and because the Commission possesses information indicating that Clapper did not do any work for Wehby or her campaign, the Commission's analysis does not address these three types of conduct.

1 nonpublic plans, projects, activities, or needs.” Compl. at 4. The Complaint cites news articles
2 to support the theory that Miller’s relationship with Wehby allowed him access to inside
3 campaign information.⁶ Another article provided to the Commission, however, states that the
4 relationship ended the previous year, in the spring of 2013.⁷

5 The Complaint also asserts that “Miller was intimately involved in the strategic decision-
6 making of If He Votes” because he had spoken on the public record about If He Votes’ polling
7 decisions as a representative of the group. *Id.* at 3; Supp. Compl. at 2. Yet the Commission
8 possesses information that Miller had no involvement in any such polling effort. Moreover, the
9 Commission possesses information that If He Votes did not conduct any polling.

10 The Complaint further asserts that by contributing funds and the use of billboard
11 advertising space, Miller was involved “in decisions regarding the time, place, and manner” of
12 the advertisement, Compl. at 3, but Miller asserts that he “had no involvement in the creation of
13 content, media purchases, or timing of content dissemination to the public attributable to [If He
14 Votes].” Miller Resp. at 1. In this case, Miller’s contribution of funds and the use of “some
15 billboard time” to If He Votes does not alone establish the conduct prong of 11 C.F.R. § 109.21.
16 The record provides no indication that Miller actually had access to non-public campaign
17 information, and it does not establish that he requested or made decisions on behalf of Wehby as
18 to how the funds or billboard time were to be used. *See* 11 C.F.R. § 109.21(d).

⁶ See Christian Gaston, *Top Oregon GOP Donor Andrew Miller Has Ties to Candidates for Governor, Senate and Congress*, THE OREGONIAN, Oct. 30, 2013, <http://www.oregonlive.com/politics/index.ssf/2013/10/top-oregon-gop-donor-andrew-mi.html>, and Jeff Mapes, *Andrew Miller, Friend of Monica Wehby, Helps Fund Ads Attacking Her GOP Rival, Jason Conger*, THE OREGONIAN, Apr. 15, 2014, <http://www.oregonlive.com/mapes/index.ssf/2014/04/andrew-miller-friend-of-monica.html>.

⁷ See John Bresnahan, *Ore. Senate Hopeful Accused of Stalking Boyfriend*, POLITICO, May 16, 2014, <http://www.politico.com/story/2014/05/ore-senate-hopeful-accused-of-stalking-boyfriend-106751.html>.

1 Under the circumstances, the Commission concludes that pursuing this matter
2 further would not be a prudent use of its resources. Accordingly, the Commission exercises its
3 prosecutorial discretion to dismiss the allegations that Andrew Miller made in-kind contributions
4 as a result of the advertisements in violation of 52 U.S.C. § 30116(a). *See Heckler*, 470 U.S.
5 821.

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